

Brooklyn Journal of International Law

Volume 44

Issue 2 07/01/2019


Article 9

7-1-2019

Comparative Analysis of the EU's GDPR and Brazil's LGPD: Enforcement Challenges with the LGPD

Abigayle Erickson

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

 Part of the [Commercial Law Commons](#), [Comparative and Foreign Law Commons](#), [Computer Law Commons](#), [European Law Commons](#), [International Law Commons](#), [Internet Law Commons](#), [Law and Politics Commons](#), [Legislation Commons](#), [Other Law Commons](#), [Privacy Law Commons](#), [Science and Technology Law Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Abigayle Erickson, *Comparative Analysis of the EU's GDPR and Brazil's LGPD: Enforcement Challenges with the LGPD*, 44 Brook. J. Int'l L. 859 (2019).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol44/iss2/9>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

COMPARATIVE ANALYSIS OF THE EU'S GDPR AND BRAZIL'S LGPD: ENFORCEMENT CHALLENGES WITH THE LGPD

INTRODUCTION

On May 25, 2018, the European Union's (EU) General Data Protection Regulation (GDPR) came into effect.¹ This new regulation standardizes the EU's data privacy law by creating a framework for use across member states.² Businesses operating across member states are subject to one set of regulations, which simplifies compliance for data privacy.³ Since the EU's GDPR took effect in May 2018, other countries have followed suit by passing their own data protection laws. In August 2018, Brazil's President Michel Temer signed the country's comprehensive data privacy regulation, *Lei Geral de Proteção de Dados Pessoais* (LGPD),⁴ into law.⁵ The LGPD mimics the GDPR in many important ways.

The GDPR applies to companies based in the EU, companies that sell to consumers in the EU, and companies that collect data from individuals residing in the EU.⁶ It has a broad definition of

1. Council Regulation 2016/679, art. 4(1), 2016 O.J. (L 119/1) [hereinafter GDPR]; see also European Comm'n, *The GDPR: New Opportunities, New Obligations* 1, 2 (2018), available at https://ec.europa.eu/commission/sites/beta-political/files/data-protection-factsheet-sme-obligations_en.pdf [hereinafter *GDPR: New Opportunities*].

2. European Commission Press Release MEMO/15/6385, European Commission — Fact Sheet, Questions and Answers — Data Protection Reform (Dec. 21, 2015), available at http://europa.eu/rapid/press-release_MEMO-15-6385_en.htm.

3. *Id.*

4. Translated as "General Data Privacy Law" in English. Lei No. 13.709, de 14 de Agosto de 2018, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 15.8.2018 (Braz.) [hereinafter LGPD].

5. Ed Taylor, *Brazil's President Signs Country's First Data Protection Law*, BLOOMBERG L. (Aug. 14, 2018), https://www.bloomberglaw.com/product/privacy/document/X2P1GM3G000000?bna_news_filter=privacy-and-data-security&jcsearch=BNA%2520000001653a5ddaaef7ffaddebfc0002#cite [hereinafter Taylor, *Brazil's President Signs Country's First Data Protection Law*].

6. *GDPR: New Opportunities*, supra note 1, at 5.

personal data and requires user consent to process data.⁷ In order to comply with the GDPR, organizations may be required to appoint a Data Protection Officer (DPO).⁸ In the event of a data breach, organizations are required to report the breach within seventy-two hours to their regional Data Protection Authority (DPA).⁹

A significant feature of the GDPR is the enforcement structure, particularly fines for breaches.¹⁰ The cost of not complying can be very expensive, including fines of up to €20 million EUR or 4 percent of the company's annual global turnover, whichever is higher.¹¹ In June 2018, *Forbes Magazine*¹² analyzed the cost

7. *Id.* at 8. Personal data is defined as “any information relating to an identified or identifiable natural person (‘data subject’).” GDPR, *supra* note 1. Data processing is defined as “any operation or set of operations which is performed on personal data . . . such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination.” GDPR, *supra* note 1, art. 4(2).

8. *GDPR: New Opportunities*, *supra* note 1, at 13. A DPO may be appointed in both private and public sectors. The DPO's role is enumerated in Article 39 of the GDPR. DPOs are responsible for the overseeing compliance with the regulation. A sample description of the DPO's role can be found in Recital 97 of the GDPR. GDPR, *supra* note 1, art. 37, recital 97, *available at* <https://gdpr-info.eu/recitals/no-97/>.

9. *GDPR: New Opportunities*, *supra* note 1, at 15; *see also* *What are Data Protection Authorities (DPAs)?*, EUR. COMM'N, https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-are-data-protection-authorities-dpas_en (last visited Dec. 27, 2018) (“DPAs are independent public authorities that supervise . . . the application of the data protection law. They provide expert advice on data protection issues and handle complaints lodged against violations of the [GDPR] and the relevant national laws.”).

10. Bernard Marr, *GDPR: The Biggest Data Breaches and the Shocking Fines (That Would Have Been)*, FORBES (June 11, 2018), <https://www.forbes.com/sites/bernardmarr/2018/06/11/gdpr-the-biggest-data-breaches-and-the-shocking-fines-that-would-have-been/#490fb7e46c10>.

11. *GDPR: New Opportunities*, *supra* note 1, at 19.

12. Forbes is a global media outlet that focuses on finance, business, and technology. *Who We Are*, FORBES, <https://www.forbes.com/forbes-media/who-we-are/> (last visited Jan. 12, 2019).

of recent data breaches had the GDPR been in force.¹³ For example, *Yahoo*¹⁴ had a data breach in 2013–2014 of about three billion accounts.¹⁵ The company did not notify its consumers quickly, and the company's revenue was over \$4 billion USD.¹⁶ Therefore, by *Forbes*' estimate, had GDPR been the law, *Yahoo* would have been fined between \$80–160 million dollars USD for noncompliance.¹⁷

In Brazil, when President Temer signed the data privacy bill into law, he vetoed many of the enforcement provisions.¹⁸ Specifically, he vetoed the section of the bill that would have created a regulatory agency like the EU's DPAs to monitor compliance and implement the enforcement provisions that remained in the final law.¹⁹ Immediately before leaving office, on December 28, 2018, President Temer signed an executive order to create the *Autoridade Nacional de Proteção de Dados* (ANPD).²⁰ Unlike the agency proposed in the draft LGPD, the ANPD is under executive control as it is connected to the office of the President.²¹ Technically, the ANPD is still an independent agency, but being so closely associated with the president may negatively influence

13. Marr, *supra* note 10.

14. *Yahoo* is a global web services corporation. It includes an email service, web database, news aggregator, and other web services. YAHOO!, <https://www.yahoo.com/> (last visited Jan. 12, 2019); *see also Yahoo! Inc.*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Yahoo-Inc> (last updated Feb. 8, 2018).

15. Marr, *supra* note 10.

16. *Id.*

17. *Id.*

18. Taylor, *Brazil's President Signs Country's First Data Protection Law*, *supra* note 5.

19. *Id.*

20. Isabel Costa Carvalho & Rafael Mendes Loureiro, *Brazil Creates a Data Protection Authority*, HOGAN LOVELLS (Jan. 11, 2019), <https://www.hldataprotection.com/2019/01/articles/international-eu-privacy/brazil-creates-a-data-protection-authority/>. *Autoridade Nacional de Proteção de Dados* is translated as Brazilian National Data Protection Authority in English. Medida Provisória No. 869, de 28 de Dezembro de 2018 (Braz.).

21. *Id.*

the autonomy of the agency.²² Temer also changed the date of adoption of the LGPD from February 2020 to August 2020.²³

Brazil's LGPD is very similar to the EU's GDPR.²⁴ Like the GDPR, the LGPD applies to companies in Brazil and those selling to people in Brazil, even if the company is not located in Brazil.²⁵ In addition, the LGPD defines personal data broadly.²⁶ Also like the GDPR, the LGPD requires consent of the user to collect data.²⁷ The LGPD, as passed, includes a similar fine structure as the GDPR for non-compliance.²⁸

This Note will discuss Brazil's new data privacy law, how it compares to the EU's GDPR, issues with enforcing Brazil's law, and suggestions for more effective enforcement. As it stands, Brazil's LGPD will be a challenge to implement effectively because the enforcement agency that was created by President Temer's executive order lacks true independence from the executive branch.²⁹ This is unlike the EU's GDPR, which requires member states to establish independent DPAs to address compliance concerns.³⁰ While the agency is immediately effective be-

22. *Id.*; see also Ed Taylor, *Brazil Creates Regulatory Agency for Data Protection Law*, BLOOMBERG L. (Jan. 2, 2019), https://www.bloomberglaw.com/product/privacy/document/XBITJJ7G000000?bc=W1siU2VhcmNoIFJlc3VsdHMiLCIvcHJvZHVjdC9wcm12YWw5L3NIYXJjaC9yZXN1bHRzL2Y5NTYyZjRhYmQxNTk4ZjJhYjYxOGJkODUxZDY0MmZlIl1d—514a13abf0448db7b7a9bcbe-abdfb7842e0c5f00&guid=3f9fd201-7e26-458d-a0a7-ef2726a61d5b&search32=8tvQ4i6tIGN-eB0RE-moUXA%3D%3DokzYfl9dQUPSqxNY-HJHtRx4umSDYfs6X0e1tP_bkWZKzM9RH0R1Q1ztqqYV0dvP7J-Pcf-axAkpHYVfwZd66yQ%3D%3D [hereinafter Taylor, *Brazil Creates Regulatory Agency*].

23. Carvalho & Loureiro, *supra* note 20.

24. Melanie Ramey, *Brazil's New General Data Privacy Law Follows GDPR Provisions*, COVINGTON: INSIDE PRIVACY (Aug. 20, 2018), <https://www.insideprivacy.com/international/brazils-new-general-data-privacy-law-follows-gdpr-provisions/>.

25. *Id.*

26. Renato Leite Monteiro, *The New Brazilian General Data Protection Law – A Detailed Analysis*, INT'L ASS'N PRIVACY PROF'LS (Aug. 14, 2018), <https://iapp.org/news/a/the-new-brazilian-general-data-protection-law-a-detailed-analysis/>.

27. Ramey, *supra* note 24.

28. *Id.*

29. Taylor, *Brazil Creates Regulatory Agency*, *supra* note 22.

30. Carvalho & Loureiro, *supra* note 20.

cause of the executive order, the Legislature has 120 days to approve its permanent adoption into law.³¹ The effectiveness of the enforcement agency is thus still undetermined. President Bolsonaro, who came into office on January 1, 2019, and the new 2019 Legislature have the opportunity to create an independent and effective DPA to regulate compliance of the LGPD.

Part I of this Note includes a brief history of Brazil and its constitutions, the evolution of privacy law in Brazil, a brief history of the EU, and the development of privacy law in the EU. Part II of this Note compares the LGPD and the GDPR. Part III of this Note analyzes the GDPR enforcement framework and the benefits and drawbacks of it. Finally, Part IV proposes possible solutions to effectively enforce Brazil's LGPD.

I. BACKGROUND: HISTORY OF BRAZIL AND THE EU AND THE DEVELOPMENT OF PRIVACY LAW

The right to privacy is enshrined in Brazil's constitution.³² This part of the Note will introduce background information on Brazil and the EU and the progression of privacy law in each jurisdiction. The first section covers Brazil's history and constitutions and describes the statutory privacy provisions in the Consumer Code,³³ regulations from the Ministry of Justice,³⁴ the

31. *Id.*

32. Renato Opice Blum et al., *Country Profile — Brazil*, BLOOMBERG L., <https://www.bloomberglaw.com/product/privacy/document/X4RQND18> (last updated Dec. 2018).

33. The Consumer Code outlines rights consumers have with regard to the personal data stored in databases. CÓDIGO DE PROTEÇÃO E DEFESA DO CONSUMIDOR [C.D.C.] art. 43 (Braz.), *translated in* RIO DE JANEIRO SECRETARY OF GOVERNMENT, CODE OF CONSUMER DEFENSE AND PROTECTION (2014), *available at* http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC_Novembro_2014_Ingles.pdf.

34. Ministerial Resolution No. 05/2002 supervises the protection of third-party access to personal consumer data. A reputable translation of this resolution is unavailable. Article 106 of the C.D.C. gives the Ministry of Justice the responsibility to supervise consumer protection. C.D.C., *supra* note 33, art. 106. Blum, *supra* note 32.

Civil Code,³⁵ and the 2014 Civil Rights Framework for the Internet (“Marco Civil Law of the Internet”).³⁶ The second section will cover a brief history of the EU and two directives, Directive 95/46/EC³⁷ and Directive 2002/58/EC,³⁸ which embodied the EU’s data privacy provisions before the GDPR.³⁹

A. History of Brazil

Brazil, a former Portuguese colony, is the largest country in South America and the fifth largest country in the world.⁴⁰ In its modern history, Brazil has had seven constitutions.⁴¹ The current Constitution, which came into effect in 1988, has nine Titles and 245 Articles and covers the structure of the government,

35. Privacy protections are also enumerated in the Consumer Code including the right to an individual cause of action:

[T]he private life of the individual being inviolable, the courts may “take the necessary steps to prevent or terminate” conduct contrary to this standard. Persons who feel aggrieved by a privacy violation can seek redress in the courts under these provisions and can obtain monetary relief and the issuance of an order to terminate the violation.

Blum, *supra* note 32 (quoting CÓDIGO CIVIL [C.C.] art. 21 (Braz.)).

36. Lei No. 12.965, de 23 de Abril de 2014, Diário Oficial da União [D.O.U.] de 24.04.2014 (Braz.), *translated in Marco Civil Law of the Internet in Brazil*, COMITÊ GESTOR DA INTERNET NO BRASIL, <https://www.cgi.br/pagina/marco-civil-law-of-the-internet-in-brazil/180> (last visited June 9, 2019) [hereinafter Marco Civil Law of the Internet].

37. Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.

38. Council Directive 2002/58, 2002 O.J. (L 201) 37.

39. Directive 95/46/EC, on the Protection of Personal Data, was enacted in October of 1995 and Directive 2002/58/EC, on the Processing of Personal Data and Privacy Protection of Electronic Communications, was enacted in July 2002 and amended by Directive 2009/136/EC in November 2009. Cédric Burton, *Country Profile — European Union*, BLOOMBERG L., https://www.bloomberglaw.com/product/privacy/pds_home/document/X5JLTFH8 (last updated Jan. 2019).

40. Richard P. Momsen et al., *Brazil*, BRITANNICA ACAD., <https://academic.eb.com/levels/collegiate/article/Brazil/106094> (last visited Mar. 21, 2019).

41. Edilenice Passos, *Update: Doing Legal Research in Brazil*, HAUSER GLOBAL L. SCH. PROGRAM (June 2015), http://www.nyulawglobal.org/globalex/Brazil1.html#_Toc448767049.

fundamental rights, social rights, taxation, welfare, among many other aspects of political and private life.⁴²

1. Brazil's Leadership

At the end of Brazil's colonial era, the country was not split up into smaller nations like many other South American colonies.⁴³ Consequently, Portuguese remained the predominant language among the non-native population.⁴⁴ In 1500, the explorer Pedro Álvares Cabral⁴⁵ encountered Brazil while on a mission to follow the Portuguese navigator Vasco da Gama's⁴⁶ route to the Spice Islands.⁴⁷ The land claimed by the Portuguese Crown was originally called Vera Cruz,⁴⁸ but because of all the brazilwood⁴⁹ that

42. *Id.*

43. Momsen, *supra* note 40.

44. *Id.*

45. The explorer Pedro Álvares Cabral is considered the first European to reach Brazil. Pedro Calmon, *Pedro Álvares Cabral*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/biography/Pedro-Alvares-Cabral> (last updated Apr. 27, 2015). He enjoyed the favor of King Manuel I of Portugal and was issued the command of thirteen ships to embark on a mission to India. *Id.* In April 1500, Cabral caught sight of what is now Brazil and he claimed the land for the King of Portugal. *Id.* Cabral stayed in Brazil for only a few days before continuing his journey to India. *Id.*

46. Vasco da Gama was the first European to sail from Western Europe to India. The King of Portugal, Manuel I, sent him on a mission to open up trade between Europe and India. *Vasco da Gama*, *HIST.*, <https://www.history.com/topics/exploration/vasco-da-gama> (last updated Aug. 21, 2018). Da Gama left Portugal and sailed down the Western coast of Africa, rounded the Cape of Good Hope, and traveled up Africa's eastern coast before arriving in India. *Id.*

47. Momsen, *supra* note 40. The Spice Islands are islands in modern day Indonesia that became famous for their spices, cloves and nutmeg. Virginia Gorlinski, *Moluccas*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/place/Moluccas> (last updated Feb. 5, 2014). Portugal, Spain, England, and the Netherlands all tried to control the islands and their lucrative spice trade. *Id.*

48. Cabral initially called Brazil *Ilha da Vera Cruz*, meaning Island of the True Cross when he landed, but discovered that it was not actually an island and renamed the land *Terra da Santa Cruz*, meaning Land of the Holy Cross. Will Lees, *The Untold Story Behind How Brazil Got its Name*, *CULTURE TRIP* (Oct. 4, 2018), <https://theculturetrip.com/south-america/brazil/articles/the-untold-story-behind-how-brazil-got-its-name/>.

49. The brazilwood industry began to flourish during colonial times because brazilwood is red and it could be used as a dye which was cheaper than other red dyes available at the time. *Id.*

was discovered, it was renamed Brazil.⁵⁰ The decades following Cabral's 1500 landing in Brazil brought mixed attention by the Portuguese, but in 1533, Portugal created the first Brazilian government.⁵¹ In 1549, Tomé de Sousa⁵² was appointed Governor-General of the colony and established the capital of Salvador, which remained Brazil's capital for over two hundred years.⁵³ By the 1800s, the independence movements around the globe, particularly the French Revolution,⁵⁴ began to influence the colony.⁵⁵ In 1822, the King of Portugal's son, Dom Pedro,⁵⁶ assembled the legislative bodies and declared independence; he was declared Emperor at the end of that year.⁵⁷ Portugal acknowledged Brazil's independence in 1825.⁵⁸

As Emperor, Pedro I and his government wrote and put into effect the first constitution for the new nation; this constitution gave the Emperor significant power.⁵⁹ A war with Argentina in the 1820s, in which Brazil lost what is now Uruguay, combined with Pedro I's inability to work with the Legislature, caused the emperor to abdicate in 1831.⁶⁰ His son, Pedro II, was only five years old at his abdication, and a series of regents ruled the country for the next tumultuous decade.⁶¹ In 1840, Pedro II came

50. Momsen, *supra* note 40.

51. *Id.*

52. Tomé de Sousa was the first Governor-General of Brazil and responsible for building the capital city of Salvador. *Tomé de Sousa*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Tome-de-Sousa> (last updated Jan. 1, 2019).

53. Momsen, *supra* note 40.

54. The French Revolution was a complete disruption of the monarchy and feudal system in France. *French Revolution*, HIST., <https://www.history.com/topics/france/french-revolution> (last updated Aug. 28, 2018). The French Revolution became an important touchpoint in history and influenced many other movements as it demonstrated the force of the people. *Id.*

55. Momsen, *supra* note 40.

56. Dom Pedro, the son of King John VII of Portugal, became the first emperor of Brazil, Pedro I, when he declared Brazil's independence from Portugal. *Pedro I*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Pedro-I> (last updated Oct. 8, 2018). Pedro came to Brazil with his family when they fled Portugal at Napoleon's conquest. *Id.* Pedro stayed in Brazil when his father returned to Portugal in 1821. *Id.*

57. Momsen, *supra* note 40.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

into power at fourteen years old and led the country for the following five decades.⁶² During his time in power, Brazil began a slow process of ending slavery, and by 1888, all slaves were emancipated.⁶³ Pedro II was the last Emperor, and in 1889, he abdicated after a civil-military coup.⁶⁴ The leader of the coup, Manuel Deodoro da Fonseca,⁶⁵ became the President.⁶⁶ Fonseca created a military-led republic with a separation of church and state and a new constitution.⁶⁷ Fonseca resigned after the Brazilian people protested his attempt to eliminate Congress.⁶⁸ The Vice President, Floriano Peixoto, became the president after Fonseca's forced resignation.⁶⁹ In 1894, the first civilian president, Prudente de Moraes, came to power.⁷⁰ His presidency began a period of "coffee presidents" who were from the coffee-producing areas of São Paulo and Minas Gerais.⁷¹ This period of time was relatively stable for Brazil, but did not provide true democracy, as not all citizens could vote and elections were often fraudulent.⁷²

The 1920s were less stable for Brazil, as various uprisings and rebellions attempted to oust the coffee presidents from power.⁷³ The urban middle class was growing impatient with the government's continued assistance to coffee farmers, but these rebellions were not immediately successful.⁷⁴ By the late 1920s, the

62. *Id.*

63. *Id.*

64. *Id.* During the late 1800s the gap between the aristocracy in the countryside and the urban populace, middle class, military, and coffee planters caused social friction that ultimately led to an overthrow of the monarchy. *Id.*

65. Manuel Deodoro da Fonseca led the *coup* that ended the Brazilian monarchy and became the first president of Brazil in 1889. *Manuel Deodoro da Fonseca*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/biography/Manuel-Deodoro-da-Fonseca> (last updated Aug. 19, 2018).

66. Momsen, *supra* note 40.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* The coffee presidents began an era of relative peace for Brazil and moved the country towards greatly increased coffee exports; this changed Brazil's economy. *Id.* The coffee presidents were also responsible for buying the coffee farmer's excess coffee in order to maintain the world-wide price. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

global effects of the Great Depression caused a steep dive in coffee prices, and the coffee president era came to an end with the 1930 rebellion that put Getúlio Vargas⁷⁵ in power.⁷⁶ Vargas was elected president twice, first from 1934 to 1945 and then from 1951 to 1954.⁷⁷

The 1960s and 1970s brought a period of military rule where Brazil was led by generals.⁷⁸ In 1988, a new constitution came into effect, and presidential elections were held for the first time in thirty years.⁷⁹ Fernando Collor de Mello⁸⁰ became President in 1990, but he was impeached and removed in 1992.⁸¹ In 1994, Fernando Henrique Cardoso⁸² became President.⁸³ Cardoso was President until 2003, when he participated in the first transfer of power from one democratically elected president to the next

75. Getúlio Vargas was involved in politics from an early age and unsuccessfully campaigned for president of Brazil in 1930. Rollie E. Poppino, *Getúlio Vargas*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Getulio-Vargas> (last updated Aug. 20, 2018). After his Presidential loss, he overthrew the government and ruled like a dictator without a congress. *Id.* Vargas was himself the casualty of a coup d'état in 1945. *Id.* In 1950, he was elected president until he killed himself in 1954 in the face of increasing opposition. *Id.*

76. *Id.*

77. *Id.*

78. José Fonseca, *A Brief History of Brazil*, N.Y. TIMES, https://archive.ny-times.com/www.nytimes.com/fodors/top/features/travel/destinations/centralandsouthamerica/brazil/riodejaneiro/fdrs_feat_129_9.html?n=Top%252FFeatures%252FTravel%252FDestinations%252FCentral+and+South+America%252FBrazil%252FRio+de+Janeiro (last visited Dec. 27, 2018).

79. *Id.*

80. Fernando Collor de Mello was elected president of Brazil in 1989, the first democratically elected president in nearly three decades. *Fernando Collor de Mello*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Fernando-Collor-de-Mello> (last updated Aug. 8, 2018). De Mello left office in 1992 after he was accused of corruption. *Id.* He was tried, convicted, and suspended from holding office for eight years. *Id.* In 2006, he was elected to the Brazilian Senate. *Id.*

81. Fonseca, *supra* note 78.

82. Fernando Henrique Cardoso was elected president in 1994 and served a second term; he was the first Brazilian president to be reelected and serve consecutive terms. *Fernando Henrique Cardoso*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Fernando-Henrique-Cardoso> (last updated June 14, 2018).

83. Fonseca, *supra* note 78.

in over four decades.⁸⁴ Michel Temer,⁸⁵ president from 2016 until 2018, came into office following the 2016 impeachment of President Dilma Rousseff.⁸⁶ Temer was Rousseff's Vice President.⁸⁷ Temer did not run for reelection; the presidential elections were held in October 2018.⁸⁸

The 2018 presidential election in Brazil was not unlike many recent elections across the world.⁸⁹ Social media played a prominent role and a nationalistic, populist candidate was elected.⁹⁰ Jair Bolsonaro⁹¹ campaigned on a platform of reducing crime

84. Momsen, *supra* note 40.

85. Michel Temer has been involved in government and politics for years before he became president. Natalia Cardenas, *Michel Temer*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Michel-Temer> (last updated Sept. 19, 2018). He was a member of the committee that drafted the 1988 Constitution. *Id.*

86. Momsen, *supra* note 40.

87. *Id.*

88. Lisandra Paraguassu, *Brazil's Unpopular Leader Scraps Re-Election Plan, Backs Meirelle*, REUTERS (May 22, 2018), <https://www.reuters.com/article/us-brazil-politics-temer/brazils-unpopular-leader-scraps-re-election-plan-backs-meirelles-idUSKCN1IN17X>.

89. Ernesto Londoño & Manuela Andreoni, *Brazil Election: How Jair Bolsonaro Turned Crisis into Opportunity*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/world/americas/jair-bolsonaro-brazil-profile.html>; see also Anthony Faiola & Marina Lopes, *Brazilian Presidential Election Goes to a Second Round as Far-Right Candidate Narrowly Misses an Outright Win*, WASH. POST (Oct. 7, 2019), https://www.washingtonpost.com/world/the_americas/brazilians-vote-in-presidential-election-with-a-trump-fan-as-front-runner/2018/10/07/7d82d512-c65d-11e8-9c0f-2ffa6d422aa_story.html?utm_term=.348e1300abdc; Ishaan Tharoor, *Is Brazil About to Elect Its Own Trump?*, WASH. POST (Sept. 21, 2018), https://www.washingtonpost.com/world/2018/09/21/is-brazil-about-elect-its-own-trump/?utm_term=.ed080acc4e81.

90. Londoño & Andreoni, *supra* note 89.

91. Jair Bolsonaro began his career as a paratrooper in the army before he got into politics. *Id.* First, in 1988, he ran for and won a seat on the Rio de Janeiro City Council. *Id.* Shortly thereafter, in 1990, Bolsonaro ran a successful campaign for a seat in Congress. *Id.* He was a controversial individual from his time in the army, but became increasingly so while in Congress. *Id.* In 1993, Bolsonaro gave a speech in Congress expressing his belief that a dictatorship would be more effective than the burgeoning democracy. *Id.* He spent twenty-seven years in Congress and focused much of his attention on security and the military, rooting out communism, and some social issues like his opposition to gay rights. *Id.* After Bolsonaro was stabbed during the campaign, he began posting videos on social media to address issues as he did not participate in any debates. *Id.*

and corruption.⁹² He used social media widely to promote his platform and interact with voters.⁹³ During the campaign, Bolsonaro was stabbed and seriously injured, but after the attack, his popularity seemed to grow.⁹⁴ Bolsonaro was elected president and inaugurated on January 1, 2019.⁹⁵

2. Brazil's Constitutional History

Since its independence from Portugal in 1822, Brazil has had seven constitutions.⁹⁶ The first constitution came into effect in 1824 under Emperor Pedro I.⁹⁷ The second constitution came into effect in 1891, when the country transitioned from a constitutional monarchy to a republic under President Fonseca.⁹⁸ The third constitution was promulgated in 1934 during President Vargas's first term.⁹⁹ It granted universal suffrage, but also gave the executive branch more power.¹⁰⁰ In 1937, the fourth constitution was enacted, also under President Vargas, after a revolt; it gave Vargas even more control.¹⁰¹ The fifth constitution came into effect in 1946 and included provisions to curb the potential for an overly powerful executive.¹⁰² It created a democracy with separate branches of government and set five-year term limits for the President.¹⁰³ The sixth constitution came into effect in 1967 after the 1964 military coup d'état¹⁰⁴ that ushered in an era of military dictatorship.¹⁰⁵ The current Brazilian Constitution¹⁰⁶

92. Tom Phillips & Dom Phillips, *Jair Bolsonaro Declared Brazil's Next President*, GUARDIAN (Oct. 29, 2018), <https://www.theguardian.com/world/2018/oct/28/jair-bolsonaro-wins-brazil-presidential-election>.

93. Londoño & Andreoni, *supra* note 89.

94. *Id.*

95. Ernesto Londoño, *Jair Bolsonaro Sworn in as Brazil's President, Cementing Rightward Shift*, N.Y. TIMES (Jan. 1, 2019), <https://www.nytimes.com/2019/01/01/world/americas/brazil-bolsonaro-inauguration.html>.

96. Passos, *supra* note 41.

97. Momsen, *supra* note 40.

98. *Id.*; see also Passos, *supra* note 41.

99. Momsen, *supra* note 40; see also Passos, *supra* note 41.

100. Momsen, *supra* note 40.

101. Momsen, *supra* note 40; see also Passos, *supra* note 41.

102. Momsen, *supra* note 40.

103. *Id.*

104. This is translated into English as "stroke of state" meaning "a sudden, usually violent, change of government through seizure of power." *Coup d'état*, BLACK'S LAW DICTIONARY (10th ed. 2014).

105. Passos, *supra* note 41.

106. In Portuguese, Constituição Federal.

came into force in 1988 at the end of the military regime.¹⁰⁷ The current document is known as the Citizen Constitution and provides for fundamental and social rights, separation of powers, organization of the government, taxation system, political rights, and other provisions.¹⁰⁸ The Constitution also gives workers the right to strike and prevents the creation of laws by presidential decree.¹⁰⁹ Of note, there are provisions reducing the voting age to sixteen years, eliminating the censorship of arts and culture, establishing maternity and paternity leave, addressing mining and oil, and stating the rights for native populations.¹¹⁰

The second title of the Constitution addresses fundamental rights and guarantees; Article Five, under the second title, addresses a number of privacy rights.¹¹¹ Specifically, Article Five establishes certain individual rights.¹¹² Article Five grants individuals the rights to privacy,¹¹³ personal security and property, property, confidentiality in communication,¹¹⁴ and the right to access of information and prohibits censorship.¹¹⁵ Interestingly,

107. Passos, *supra* note 41.

108. *Id.*

109. Momsen, *supra* note 40.

110. *Brazil Completes New Constitution*, N.Y. TIMES (Sept. 3, 1988), <https://www.nytimes.com/1988/09/03/world/brazil-complete-new-constitution.html>.

111. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.), *translated in Constitution of the Federative Republic of Brazil*, CÂMARA DOS DEPUTADOS, <http://bd.camara.gov.br/bd/handle/bdcamara/36019> (last visited June 9, 2019) [hereinafter *Brazilian Constitution*].

112. Passos, *supra* note 41.

113. *Brazilian Constitution*, *supra* note 111, art. 5(X) (“[T]he privacy, private life, honor and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured.”).

114. *Brazilian Constitution*, *supra* note 111, art. 5(XII) (“[T]he secrecy of correspondence and of telegraphic, data and telephone communications is inviolable, except, in the latter case, by court order, in the cases and in the manner prescribed by law for the purposes of criminal investigations or criminal procedural finding of facts.”).

115. Passos, *supra* note 41. The right to access of information is enumerated in section LXXII of Article Five and has been translated as “habeas data”: LXXII – “Habeas data” shall be granted:

(a) To ensure the knowledge of information related to the person of the petitioner, contained in records or data banks of government agencies or of agencies of a public character;

Article Five also gives equal protection to Brazilian nationals and foreign nationals; any person living in Brazil benefits from these privacy rights.¹¹⁶

3. Development of Privacy Law

In addition to the privacy rights enumerated in the Constitution, Brazil also has statutory privacy provisions in the Consumer Code, regulations from the Ministry of Justice, the Civil Code,¹¹⁷ and in the Marco Civil Law of the Internet.¹¹⁸ The Consumer Code of Protection and Defense (CDC)¹¹⁹ was promulgated in 1990 in accordance with Article 5 of the Constitution.¹²⁰ Enumerated in Article 43 of the CDC are rights for consumers to access their stored data from registries and databases.¹²¹ Article 43(2) also calls for consumers' consent before their personal data can be recorded.¹²² Additionally, Article 43(3) empowers consumers to correct incorrect information, and the party maintaining the information must communicate the change to other involved parties within five business days.¹²³

The Marco Civil Law of the Internet in Brazil enumerates rights for users of the Internet, protects net neutrality, reinforces rights to free speech, and empowers judges to consider preserving confidentiality when addressing requests for records.¹²⁴ Chapter III, Section II of the law specifically addresses personal data protections.¹²⁵ Article 10 requires retained data to

(b) For the correction of data, when the petitioner does not prefer to do so through a confidential process, either judicial or administrative.

Brazilian Constitution, *supra* note 111, art. 5(LXXII).

116. Brazilian Constitution, *supra* note 111, art. 5; *see also* Blum, *supra* note 32.

117. Blum, *supra* note 32 (quoting C.C., *supra* note 36, art. 21) ("The private life of the individual being inviolable . . . [p]ersons who feel aggrieved by a privacy violation can seek redress in the courts . . . and can obtain monetary relief and the issuance of an order to terminate the violation").

118. Blum, *supra* note 32.

119. Código de Proteção e Defesa do Consumidor in Portuguese.

120. C.D.C., *supra* note 33, art. 1.

121. *Id.* art. 43.

122. *Id.* art. 43(2).

123. *Id.* art. 43(3).

124. *See* Marco Civil Law of the Internet, *supra* note 36.

125. *Id.* ch. III, § II.

be kept private and only released with a court order.¹²⁶ Article 11 requires Brazilian law to be upheld when any part of the “collection, storage, retention and treating of personal data or communications data” is executed in Brazil, even if the act is done by a foreign corporation.¹²⁷ Article 12 of this chapter also outlines enforcement actions for breaching Articles 10 and 11.¹²⁸ Enforcement actions include warnings, fines, suspension of activities, and prohibition on the actions.¹²⁹

In 2016, former President Rousseff signed a regulation to clarify the Marco Civil Law of the Internet.¹³⁰ The decree primarily addresses net neutrality, but also addresses some privacy and confidentiality issues.¹³¹ Specifically, the decree requires that as little personal data and private correspondence is maintained as possible.¹³²

In Brazil, a bill can be proposed by a member of the Legislature, the President, the courts, the Attorney General, or by a citizen.¹³³ If a bill is approved by one chamber of the Legislature, it is then reviewed by the other chamber and voted on.¹³⁴ If the bill is approved, it is sent to the President to sign and approve.¹³⁵ If the President vetoes the bill, the President must inform the

126. *Id.* art. 10.

127. *Id.* art. 11.

128. *Id.* art. 12.

129. *Id.*

130. Ed Taylor, *Brazil Internet Decree Aimed at Clarifying 2014 Law*, BLOOMBERG L. (May 16, 2016), <https://www.bloomberglaw.com/product/privacy/docu->

[ment/XF21LDU0000000?bc=W1siU2VhemNoIFJlc3VsdHMiLCIvcHJvZHVjdC9wcml2YW5L3NIYXJjaC9yZXN1bHRzL2Y5NTYyZjRhYmQxNTk4ZjllYjYxOGJkODUxZDY0MmZlIl1d-514a13abf0448db7b7a9bcbe-abdfb7842e0c5f00&guid=fa6556c5-ce1e-4dcc-9f1e-197c4969e384&search32=6bzBtWKHtI7cYtnYbaf04A%3D%3D5srjpMLd-fLs8cHHS hCIimTLv4PFtas3ImTWxfYv6hiJ0GjOcrKIFVM860ezOa01tWYs wjzS5Yni3lBQ4lE3ZQ%3D%3D](https://www.bloomberglaw.com/product/privacy/docu-ment/XF21LDU0000000?bc=W1siU2VhemNoIFJlc3VsdHMiLCIvcHJvZHVjdC9wcml2YW5L3NIYXJjaC9yZXN1bHRzL2Y5NTYyZjRhYmQxNTk4ZjllYjYxOGJkODUxZDY0MmZlIl1d-514a13abf0448db7b7a9bcbe-abdfb7842e0c5f00&guid=fa6556c5-ce1e-4dcc-9f1e-197c4969e384&search32=6bzBtWKHtI7cYtnYbaf04A%3D%3D5srjpMLd-fLs8cHHS hCIimTLv4PFtas3ImTWxfYv6hiJ0GjOcrKIFVM860ezOa01tWYs wjzS5Yni3lBQ4lE3ZQ%3D%3D)

131. *Id.*

132. *Id.*

133. *Legal Research Guide: Brazil — The Legislative Branch*, L. LIBR. CONG., <https://www.loc.gov/law/help/legal-research-guide/brazil-legislative-branch.php> (last updated June 9, 2015).

134. *Id.*

135. *Id.*

President of the Senate why it was vetoed.¹³⁶ The Legislature can overturn a presidential veto with an “absolute majority.”¹³⁷

With the strong privacy protections granted by the Constitution, special consumer protections, and the Marco Civil Law of the Internet, it is easy to see the legal progression to the LGPD. With strong privacy values and the global climate of data privacy, particularly the GDPR, the LGPD was a logical next step for privacy protections in Brazil.

B. History of the EU

This subsection provides a brief overview of the history of the EU, how legislation is passed, and how data privacy law developed in the EU up until the passage of the GDPR. The EU is a supranational organization made up of twenty-eight member states.¹³⁸ The EU has numerous institutions to accomplish its goals, create law, and uphold the law.¹³⁹

1. Founding Treaties and How Legislation is Enacted

The EU was formed in the 1990s after a series of treaties where states endeavored to join European countries.¹⁴⁰ After the end of the World War II, six European countries joined together to create the European Coal and Steel Community (ECSC) to promote peace and economic and political cooperation.¹⁴¹ The

136. *Id.*

137. *Id.*

138. *About the EU: Countries*, EUR. UNION, https://europa.eu/european-union/about-eu/countries_en (last visited Dec. 27, 2018). The member states are: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. *Id.*

139. *About the EU: EU Institutions and Bodies in Brief*, EUR. UNION, https://europa.eu/european-union/about-eu/institutions-bodies_en (last visited Dec. 27, 2018).

140. *About the EU: History of the European Union*, EUR. UNION, https://europa.eu/european-union/about-eu/history_en (last visited Dec. 27, 2018).

141. *Id.* The original member states were Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. *Id.* The Treaty establishing the European Coal and Steel Community was signed on April 18, 1951, and entered into force on July 23, 1952; the Treaty expired on July 23, 2002. *Id.* The purpose of the Treaty was “to create interdependence in coal and steel so that one country could no longer mobilise its armed forces without others knowing.” *Id.* This eased distrust and tensions after WWII. The ECSC treaty expired in 2002. *EU*

ECSC laid the foundation for the treaties that followed that created the current EU. In 1957, the Treaty of Rome created the European Economic Community (EEC) to further promote economic cooperation across industries.¹⁴² In 1986, the member states signed onto the Single European Act (SEA) to create a single market across Europe.¹⁴³ In 1989, the Berlin Wall fell, and East and West Germany were officially reunited in 1990, bringing East Germany into the EEC.¹⁴⁴ In 1992, the Treaty on the European Union (“Maastricht Treaty”) was signed in Maastricht, the Netherlands, which officially created the EU.¹⁴⁵ The Maastricht Treaty created EU citizenship, generated a plan for adoption of a universal currency, the euro, and reformed and modified EU institutions.¹⁴⁶ The Treaty made the European Commission (Commission) more accountable to European Parliament; the term of service for commissioners was lengthened to five years, and they had to be approved by the Parliament.¹⁴⁷ The Treaty also created new institutions to facilitate the move to a common currency: the European Central Bank,¹⁴⁸ the European System of Central Banks,¹⁴⁹ and the European Monetary

Law: EU Treaties, EUR. UNION, https://europa.eu/european-union/law/treaties_en (last visited Dec. 27, 2018).

142. *About the EU: History of the European Union*, *supra* note 140. The Treaty of Rome was signed on March 25, 1957, and entered into force on January 1, 1958. The Treaty extended European integration by providing for general economic cooperation.” *EU Law: EU Treaties*, *supra* note 141.

143. *The Single European Act*, EUR. UNION, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:xy0027> (last visited Jan. 14, 2019).

144. *About the EU: History of the European Union*, *supra* note 140.

145. *Id.* The treaty’s ratification process was challenging in some European countries. Voters in Denmark did not pass the referendum the first time it was voted on in 1992, but later approved an amended treaty in 1993. *Id.*

146. Matthew J. Gabel, *European Union*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/European-Union#ref224464> (last updated Dec. 27, 2018). The euro was adopted by financial markets in 1999 and the general public in 2002. *Id.*

147. *Id.*

148. The European Central Bank was established in 1998 in Germany. Its role is “to manage the euro, keep prices stable and conduct EU economic & monetary policy.” *European Central Bank*, EUR. UNION, https://europa.eu/european-union/about-eu/institutions-bodies/european-central-bank_en (last visited Jan. 14, 2019).

149. The European System of Central Banks is made up of the European Central Bank and all the national banks of the EU member states. *ECB, ESCB, and the Eurosystem*, EUR. CENT. BANK, <https://www.ecb.europa.eu/ecb/orga/escb/html/index.en.html> (last visited Jan. 14, 2019).

Institute.¹⁵⁰ By 1993, the single market envisioned by the SEA was established with “the ‘four freedoms’ of: movement of goods, services, people and money.”¹⁵¹ In 1997, the Treaty of Amsterdam paved the way for further reforms to EU institutions and highlights goals for improving employment and protecting other rights.¹⁵²

In 2002, the Convention on the Future of Europe¹⁵³ began working on a draft constitution for the EU.¹⁵⁴ The proposed constitution was signed in 2004, but was not ratified because the people of France and the Netherlands voted against it.¹⁵⁵ The constitution’s ratification failed, so work began on the final founding treaty, the Treaty of Lisbon, in 2007 in order to address the growing membership of the union.¹⁵⁶ Political and legal instruments and agencies became necessary to govern.¹⁵⁷ The Treaty of Lisbon was signed and ratified by all member states and came into force in 2009.¹⁵⁸

As a result of these treaties, seven EU institutions capable of passing several different kinds of statutes were created.¹⁵⁹ These institutions are: the European Parliament (Parliament), European Council, Council of the EU, Commission, Court of Justice of the EU, European Central Bank, and Court of Auditors.¹⁶⁰ The Commission is like the executive branch and can also introduce

150. Gabel, *supra* note 146. The European Monetary Institute was active from 1994 to 1998. *The European Monetary Institute*, EUR. CENT. BANK, https://www.ecb.europa.eu/ecb/access_to_documents/archives/emi/html/index.en.html (last visited Jan. 14, 2019). It established the European System of Central Banks and the European Central Bank. *Id.*

151. *About the EU: History of the European Union*, *supra* note 140.

152. Gabel, *supra* note 146.

153. The Convention of the Future of Europe was organized to deliberate on the needs of the member state for the future of the EU. Ina Sokolska, *The Treaty of Nice and the Convention on the Future of Europe*, EUR. UNION (Oct. 2018), <http://www.europarl.europa.eu/factsheets/en/sheet/4/the-treaty-of-nice-and-the-convention-on-the-future-of-europe>. There were four main issues to address: “a better division of competences; simplification of the EU’s instruments for action; increased democracy, transparency and efficiency; and the drafting of a constitution for Europe’s citizens.” *Id.*

154. Gabel, *supra* note 146.

155. *Id.*

156. *Id.*

157. *Id.*

158. *About the EU: History of the European Union*, *supra* note 140.

159. Burton, *supra* note 39.

160. *Id.*

legislation and enter into international agreements; it consists of commissioners who are selected by member states.¹⁶¹ Parliament shares legislative powers with Council of the EU.¹⁶² There are 751 members of Parliament who are elected by each member state; the seats are distributed amongst the member states by approximate population—not unlike the United States House of Representatives.¹⁶³ Parliament cannot propose legislation but approves legislation.¹⁶⁴ The Council of the EU is comprised of ministers from member states and the President is selected on a six-month rotating basis; it is analogous to the United States Senate.¹⁶⁵

The EU has the ability to pass different kinds of legislation with different degrees of obligations for the member states. There are three different kinds of statutes that are binding and two which are non-binding.¹⁶⁶ The binding acts are regulations, directives, and decisions.¹⁶⁷ Regulations are legislative acts that are binding on all EU member states and apply automatically.¹⁶⁸ In contrast, directives are legislative acts with a goal or minimum requirement that all member states must adopt through their national legislature. Finally, decisions are binding just on the member state that is the subject of the decision.¹⁶⁹ The two types of nonbinding acts are recommendations and opinions.¹⁷⁰

There are four ways legislation can be enacted in the EU: through ordinary legislative procedure, cooperation, assent, and consultation.¹⁷¹ During ordinary legislative procedure, the Commission proposes an act and submits the proposal to the Council of Ministers, which then sends it to Parliament; if Parliament agrees, the legislation is enacted.¹⁷² Cooperation is usually used

161. Duncan E. Alford, *European Union Legal Materials: An Infrequent User's Guide*, HAUSER GLOBAL L. SCH. PROGRAM (Dec. 2016), https://www.nyu-lawglobal.org/globalex/European_Union1.html.

162. Burton, *supra* note 39; *see also* Alford, *supra* note 161.

163. Alford, *supra* note 161.

164. *Id.*

165. *Id.*

166. Burton, *supra* note 39.

167. *Id.*

168. *Id.*

169. *Id.* *See also* Alford, *supra* note 161.

170. Burton, *supra* note 39.

171. Alford, *supra* note 161.

172. *Id.*

for economic or monetary legislation, while assent and consultation are typically used for agriculture, trade, and tax legislation.¹⁷³

2. Development of Privacy Law in the EU

When the Treaty of Lisbon came into force in 2009, the EU Charter of Fundamental Rights became binding along with it.¹⁷⁴ The EU Charter of Fundamental Rights enumerates fundamental rights and freedoms for the people of the EU.¹⁷⁵ These rights had previously been found in the case law from the Court of Justice of the EU, the European Convention on Human Rights, the constitutions of the member states, and international norms; the EU Charter of Fundamental Rights created one document to reflect all of the sources of these rights.¹⁷⁶ The six titles of the Charter cover dignity (Title I), freedoms (Title II), equality (Title III), solidarity (Title IV), citizens' rights (Title V), and justice (Title VI).¹⁷⁷ In addition, under Title II, Article 8, the Charter enumerates personal data protections.¹⁷⁸

The GDPR is the most recent comprehensive EU law dealing with personal data and privacy, but the EU has enumerated strong privacy protections for its citizens through various legislative acts.¹⁷⁹ Before the GDPR there was Directive 95/46/EC on the protection of personal data and Directive 2002/58/EC on the processing of personal data and privacy protection of electronic communications.¹⁸⁰ As directives, the legislation set out goals or minimum requirements, but the member states had to pass their own national laws to adopt these goals.¹⁸¹ Directive 95/46/EC was repealed by the GDPR when it came into force.¹⁸² Directive 95/46/EC laid the foundation for the many of the provisions of

173. *Id.*

174. *Why Do We Need the Charter?*, EUR. UNION, https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en (last visited Jan. 13, 2019).

175. *Id.*

176. *Id.*

177. Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2010 O.J. (C 83) 392 [hereinafter Charter of Rights].

178. *Id.* art. 8.

179. Burton, *supra* note 39.

180. *Id.*

181. *Id.*

182. *Id.*

the GDPR.¹⁸³ The directive addressed a number of areas that subsequently became the legal bases for the GDPR, including the definition of personal data and data controller, processing requirements, rights afforded to the data subject, remedies for breach, and transferring of data.¹⁸⁴ Article 7 of the directive enumerates the guidelines for the processing of personal data, including consent of the data subject, complying with a contract, protecting the individual's vital interests, and performing necessary tasks for public interest.¹⁸⁵ Article 8 of the directive enumerates other privacy protections for certain types of data, such as race and health.¹⁸⁶ Before the GDPR came into effect, the EU had some data privacy protections and strong rights to privacy enumerated in legislation; the GDPR built on this foundation and standardized protections across member states.

The GDPR legislation took a number of years to be drafted.¹⁸⁷ It was first introduced by the Commission in 2012; the Parliament proposed a version in 2014, and in 2015, the Council proposed its own version.¹⁸⁸ The three branches came together in 2015 and negotiated the GDPR text, which was approved by Parliament in April 2016 and came into effect on May 25, 2018.¹⁸⁹ As an EU regulation, the GDPR is binding on all member states.¹⁹⁰

II. COMPARATIVE ANALYSIS OF GDPR AND LGPD

The LGPD mirrors the GDPR in many ways.¹⁹¹ The LGPD adopts many of the GDPR provisions and modifies other provisions.¹⁹² The LGPD is not as lengthy or as comprehensive a document as the GDPR and has fewer articles.¹⁹³ This part of the

183. *Id.*

184. Directive 95/46/EC, *supra* note 37.

185. *Id.* art. 7.

186. *Id.* art. 8.

187. Burton, *supra* note 39.

188. *Id.*

189. *Id.*

190. *Id.*

191. Michael Baxter, *Brazil's General Data Protection Law isn't Quite GDPR*, GDPR: REPORT (Aug. 21, 2018), <https://gdpr.report/news/2018/08/21/brazils-general-data-protection-law-isnt-quite-gdpr/>.

192. Bruno Bioni et al., *GDPR Matchup: Brazil's General Data Protection Law*, INT'L ASS'N PRIVACY PROF'LS (Oct. 4, 2018), <https://iapp.org/news/a/gdpr-matchup-brazils-general-data-protection-law/>.

193. *Id.*; see also Baxter, *supra* note 191.

Note will first explain the hallmarks of the GDPR. Next, it will analyze the LGPD and compare the GDPR and the LGPD.

A. Overview of Key Provisions of the GDPR

The GDPR was approved by the European Parliament on April 14, 2016 and entered into force on May 25, 2018.¹⁹⁴ The law repealed Directive 95/46/EC and modified its provisions in important ways.¹⁹⁵ The GDPR accomplishes the following: it defines personal data broadly; applies to companies and organizations doing business with people in the EU even if the business has no geographic location within the EU; enumerates an individual's right to data portability; introduces the DPO role and its requirements; requires notifications of breaches within seventy-two hours to designated DPAs; and levies high fines for failure to comply with the law.¹⁹⁶

The GDPR enumerates six legal bases for processing personal data: (1) consent, (2) contractual performance, (3) legal obligation, (4) life protection, (5) public interest, and (6) legitimate interest.¹⁹⁷ Consent is an important basis for processing of personal data and must be "freely given, informed and unambiguous."¹⁹⁸ Additionally, Article 7 enumerates individuals' right to withdraw consent and states that "it shall be as easy to withdraw as to give consent."¹⁹⁹ In particular, Article 7 explains the requirement that consent be freely given. It suggests that a contract, which is conditional on consent to use personal data that is irrelevant to the contract, is not in fact freely given consent.²⁰⁰ The consent requirement of the GDPR is fundamental, and it is clear to see that this basis stems from the EU's strong privacy protections.²⁰¹

The GDPR adopted a broad definition of personal data: any data about a data subject is personal data.²⁰² A key component

194. Burton, *supra* note 39.

195. *Id.*

196. *Id.*

197. GDPR, *supra* note 1, art. 6; *see also* Bioni, *supra* note 192.

198. GDPR, *supra* note 1, art. 4(11); *see also* Bioni, *supra* note 192.

199. GDPR, *supra* note 1, art. 7(3).

200. *Id.* art. 7(4).

201. *See* Directive 95/46/EC, *supra* note 37; Charter of Rights, *supra* note 177.

202. GDPR, *supra* note 1, art. 4(1).

of this broad definition is that the data subject must be an “identifiable natural person.”²⁰³ The provision gives examples of identifying factors, such as a name, physical appearance, cultural identity, and identification number.²⁰⁴ This means that almost all data about or relating to humans falls under this definition. This is a lot of data that is protected.

Another component of the GDPR is its extraterritorial scope.²⁰⁵ The law applies to organizations processing personal data associated with their activity in the EU, establishments processing personal data within the EU of data subjects in the EU, and organizations marketing their goods or services in the EU.²⁰⁶ Thus, the law has a broad application to the kinds of data processed and the scope of where the data is processed.

The GDPR also enumerates, in Section 3, rights related to corrections of personal data, the right to data portability, and the right to erasure, which is commonly referred to as the right to be forgotten.²⁰⁷ The right to data portability, enumerated in Article 20, allows an individual to request his or her consensually-provided personal data from a data controller and take and move it to another data controller.²⁰⁸ Further, the individual can have the data transferred directly between data controllers where practicable.²⁰⁹

The GDPR also introduced the role of DPOs, breach notification requirements, and DPAs.²¹⁰ Under Article 37, there are certain situations where a DPO must be designated, but a DPO is not required under all circumstances.²¹¹ Another important feature of the GDPR is the breach notification requirement outlined in Article 33.²¹² If a breach occurs, the data controller is required to report as soon as practicable, but within seventy-two hours of his or her awareness of the breach.²¹³ The data controller reports to the DPA, and if the notification is not made within the prescribed time period, the notification must include the reasons

203. *Id.*

204. *Id.*

205. *Id.* art. 3.

206. *Id.*

207. *Id.* arts. 16–20.

208. *Id.* art. 20.

209. *Id.*

210. *Id.* arts. 33, 37, ch. 6.

211. *Id.* art. 37.

212. *Id.* art. 33.

213. *Id.*

the breach was not timely reported.²¹⁴ The GDPR devotes an entire chapter to describing the roles of the DPA, the DPA's powers, and the importance of the DPA's independence.²¹⁵ For instance, Article 52 specifically addresses the importance of independence.²¹⁶ Not only is the DPA required to be independent in the way it undertakes its work, but the individual members of the authority are also required to act independently.²¹⁷ The role of the DPA and its enforcement powers will be further described in Part III of this Note.

B. Overview of the LGPD and How It Compares to the GDPR

Brazil's LGPD is shorter and less proscriptive than the GDPR.²¹⁸ The GDPR is quite proscriptive, and the EU has published recitals to explain the provisions of the law. Brazil has not yet published guidelines to explain and interpret the LGPD. The ANPD is given the authority to interpret the LGPD, but it has not yet done so; the agency was only established by executive order on December 28, 2018.²¹⁹ Some commentators suggest that the less proscriptive nature of the LGPD makes it more flexible than the GDPR.²²⁰ Before the law comes into effect, however, the lack of proscription and absence of explanatory texts could be cause for confusion and uncertainty for organizations preparing to comply.

Like the GDPR, the LGPD enumerates the legal bases for processing personal data.²²¹ The LGPD enumerates ten discrete legal bases: (1) consent, (2) legal obligation, (3) implementation of public policies by the public administration, (4) research by public study entities, (5) contractual performance, (6) exercise of

214. *Id.*

215. *Id.* ch. 6.

216. *Id.* art. 52.

217. *Id.*

218. Bioni, *supra* note 192; *see also* Baxter, *supra* note 191.

219. Carvalho & Loureiro, *supra* note 20; *see also* Taylor, *Brazil Creates Regulatory Agency*, *supra* note 22.

220. Gustavo Artese, *Yes! A Brazilian Privacy Law! But Not Quite Yet...*, INT'L ASS'N PRIVACY PROF'LS (July 26, 2018), <https://iapp.org/news/a/yes-a-brazilian-privacy-law-but-not-quite-yet/>; *see also* David A. Zetoon, *Is the New Brazilian Data Privacy Statute Really Similar to the GDPR?*, BRYAN CAVE LEIGHTON PAISNER (Oct. 23, 2018), <https://www.bryancave.com/en/thought-leadership/is-the-new-brazilian-data-privacy-statute-really-similar-to-the.html>.

221. Bioni, *supra* note 192.

rights in legal proceedings, (7) life protection, (8) health protection, (9) legitimate interest, and (10) protection to credit.²²² The goals of the LGPD text are to “not only to guarantee individual rights, but also to foster economic, technological and innovation development through clear, transparent and comprehensive rules for the adequate use of personal data,” which is similar to the goals of the GDPR.²²³

One of the many similarities the LGPD has with the GDPR is the broad definition of personal data.²²⁴ The LGPD provision is more concise than the GDPR definition, and personal data is defined as “information regarding an identified or identifiable natural person.”²²⁵ This could be construed to be as broad as the GDPR provision, but there are no further examples enumerated in the law.²²⁶

Another similarity to the GDPR is the extraterritorial scope of the LGPD.²²⁷ Specifically, Article 3 of the LGPD addresses the territorial scope of the law; it applies to any organization in Brazil or conducting business in Brazil that collects personal data from individuals in the country.²²⁸ This mirrors Article 3 of the GDPR, which outlines the broad scope of the EU’s law.²²⁹

Yet another similarity between the LGPD and the GDPR is an individual’s right to data portability.²³⁰ Under Article 18 of the LGPD, an individual can request their personal data be moved to another data controller.²³¹ This data portability right is not entirely new under Brazilian law.²³² Under Brazil’s General Portability Regulation of Anatel, individuals could request data portability for data linked to a telephone number.²³³

There are also some differences between the GDPR and LGPD. Under the version of the LGPD that President Temer signed into

222. LGPD, *supra* note 4, art. 7; *see also* Bioni, *supra* note 192.

223. Monteiro, *supra* note 26.

224. Bioni, *supra* note 192.

225. LGPD, *supra* note 4, art. 5(1).

226. Bioni, *supra* note 192.

227. *Id.*

228. LGPD, *supra* note 4, art. 3.

229. GDPR, *supra* note 1, art. 3.

230. Bioni, *supra* note 192.

231. LGPD, *supra* note 4, art. 18.

232. Bioni, *supra* note 192.

233. *Id.* The right to request data portability for telephone numbers was created in 2007 under Resolution 460/07, which is known as the General Portability Regulation of Anatel. *Id.*

law in August 2018, the role of the DPO was different from that of the GDPR.²³⁴ Under Article 41 of the LGPD, DPOs must be natural persons, unlike the GDPR where the DPO can be a natural or legal person.²³⁵ Additionally, under the LGPD, DPOs are required for all data controllers, unlike the GDPR where DPOs are not required for all controllers.²³⁶ Under the executive order that President Temer signed on December 28, 2018, however, the DPO role was changed slightly and is no longer required to be a natural person, or human person.²³⁷

Additional differences between the LGPD and GDPR are apparent when comparing the enforcement provisions of both laws. Unlike the GDPR, the LGPD does not give a concrete requirement for breach notifications.²³⁸ Under Article 48, communication about “a security incident that may create risk” must be addressed to the ANPD “in a reasonable time period.”²³⁹ The LGPD leaves a lot of room for the ANPD to create further guidelines, but does not specifically enumerate the breach notification requirement as the GDPR does.²⁴⁰ In the version of the law President Temer signed in August 2018, all provisions establishing the ANPD were vetoed.²⁴¹ It is not entirely clear yet from Temer’s December 2018 executive order how similar or dissimilar the authority will be to the DPAs required by the GDPR. The newly established ANPD is not as independent as the Brazilian Legislature intended with the LGPD, as President Temer attached the ANPD to the executive branch instead of the judicial branch.²⁴² Finally, another difference between the LGPD and the GDPR is the fine structure.²⁴³ While similar, the ceiling on fines under the LGPD is up to 2 percent of Brazilian revenue—not global revenue as in the GDPR.²⁴⁴ Therefore, the fines for

234. *Id.*

235. Bioni, *supra* note 192.

236. LGPD, *supra* note 4, art. 41; *see also* Bioni, *supra* note 192.

237. Carvalho & Loureiro, *supra* note 20.

238. Bioni, *supra* note 192.

239. LGPD, *supra* note 4, art. 48.

240. *Id.*; *see also* Bioni, *supra* note 192.

241. LGPD, *supra* note 4, arts. 55–59.

242. Carvalho & Loureiro, *supra* note 20.

243. Jeremy Feigelson et al., *Inside Brazil’s New Data Protection Law*, PORTFOLIO MEDIA, INC. (Aug. 23, 2018), <https://www.law360.com/articles/1075396/print?section=publicpolicy>.

244. *Id.*

breaching under the LGPD are less—potentially, considerably less—than for breaching the GDPR.

III. ANALYSIS OF THE GDPR ENFORCEMENT FRAMEWORK AND WHY IT WORKS

Enforcement mechanisms are instrumental in securing compliance with laws. This part of the Note will first describe the GDPR's enforcement framework and then evaluate the benefits of the enforcement framework.

A. GDPR Enforcement Mechanism

A major component of enforcing the GDPR is the creation of regional DPAs. Under the GDPR, member states must establish a DPA to oversee and enforce the GDPR.²⁴⁵ The DPAs' enforcement responsibilities can be categorized in two ways: individual rights protections and compliance with data processing.²⁴⁶ If a violation of the regulation is suspected, the DPAs have investigative authority and can issue warnings to the data processor.²⁴⁷ When a violation is confirmed, the DPAs have several enforcement measures they can exercise.²⁴⁸ The DPA can reprimand the data controller or data processor, order the data controller or data processor to comply with the regulation, demand compliance with an individual's request to exercise the rights afforded to him or her under the regulation, and require data to be deleted to comply with an individual's rights.²⁴⁹ The DPA can also take more imposing enforcement measures and curtail the data processing capabilities of data controllers.²⁵⁰ Finally, fines can be imposed for the most serious breaches.²⁵¹

Article 58 of the GDPR enumerates the DPAs' enforcement authority.²⁵² DPAs are granted investigative powers and can audit,

245. GDPR, *supra* note 1, art. 51.

246. Alex Tolsma, *GDPR Top Ten: #7 – Data Protection Authority Enforcement Methods*, DELOITTE (Jan. 27, 2017), <https://www2.deloitte.com/nl/nl/pages/risk/articles/cyber-security-privacy-gdpr-top-ten-7-data-protection-authority-enforcement-methods.html>.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. GDPR, *supra* note 1, art. 83; *see also* Tolsma, *supra* note 246. These fines can reach 4 percent of global turnover of €20 million EUR. *Id.*

252. GDPR, *supra* note 1, art. 58.

review certifications, get access to equipment used for data processing, and reach the location where the data controller or processor processes data.²⁵³ Additionally, the DPAs are empowered to correct non-compliant behavior.²⁵⁴ They can warn data controllers and processors of likely non-compliance, issue warnings to data controllers and processors who have already breached, and stop data processing altogether.²⁵⁵ DPAs are also empowered to take stronger steps to correct serious breaches including fines.²⁵⁶

B. Benefits and Challenges of the GDPR Enforcement Mechanism

GDPR only just came into effect in May 2018, and therefore, not all enforcement issues have been brought to light, nor have there been enough publicized breaches to determine if the enforcement mechanisms are entirely effective. Interestingly, however, individuals have played an important role in enforcing the GDPR.²⁵⁷ Individual data subjects are given significant rights under the GDPR and have a lot of power to compel compliance with the law.²⁵⁸ Individuals can file complaints directly with their regional DPAs, and if unresolved, businesses are at the mercy of their consumers and the negative public relations that can stem from a data breach. This kind of reputational harm can be more damaging than a fine. While companies have braced for fines, individuals' ability to complain could be a more powerful enforcement mechanism.

IV. IMPLEMENTING AN ENFORCEMENT MECHANISM

The LGPD, as passed by the Legislature, adopted a similar enforcement framework to the GDPR. President Temer, after previously vetoing the creation of an enforcement agency, created

253. *Id.* art. 58(1).

254. *Id.* art. 58(2).

255. *Id.*

256. *Id.*

257. Andrew Clearwater, *GDPR Enforcement: Is It Really About the Fines?*, INT'L ASS'N PRIVACY PROF'LS (June 26, 2018), <https://iapp.org/news/a/gdpr-enforcement-is-it-really-about-the-fines/>.

258. *Id.*

the ANPD through an executive order.²⁵⁹ The most straightforward, effective solution for enforcement would be for President Bolsonaro to establish the enforcement agency as originally passed by the Brazilian Legislature. This would ensure the independence and autonomy of the agency to interpret the law and ensure compliance. It would also be beneficial to global companies conducting business in Brazil, as they have already taken steps to comply with the GDPR; the original enforcement agency functions much like the DPAs in the EU.

In addition, both the EU and Brazil have strong privacy protections for individuals.²⁶⁰ Both already had some data privacy protections in place prior to the enactment of personal data privacy measures. The two jurisdictions have strong histories of privacy protections and are economic leaders in their regions, so it is likely that similar solutions will be effective in both places.

Finally, as created by President Temer's executive order, the ANPD, is under executive control with board members who are appointed by the President.²⁶¹ This raises serious questions of autonomy. If, like the GDPR, an influential aspect of the enforcement mechanism for the LGPD is individuals' filing complaints with the ANPD, the ANPD's trustworthiness to perform this function can be undermined by a President who is accused of undermining the rights of many of the country's citizens.²⁶² The LGPD cannot be effectively enforced with the ANPD as created by the December 2018 executive order.

259. Carvalho & Loureiro, *supra* note 20; see also Taylor, *Brazil Creates Regulatory Agency*, *supra* note 22.

260. See *infra* Sections I.A.3, I.B.2.

261. Carvalho & Loureiro, *supra* note 20.

262. See generally President Bolsonaro "Declare War" on Brazil's Indigenous Peoples – Survival Responds, SURVIVAL INT'L (Jan. 3, 2019), <https://www.survivalinternational.org/news/12060> (discussing Bolsonaro's "theft" of land from indigenous communities); see also Elaine Brum, *How a Homophobic, Misogynist, Racist "Thing" Could be Brazil's Next President*, GUARDIAN (Oct. 6, 2018), <https://www.theguardian.com/commentisfree/2018/oct/06/homophobic-misogynist-racist-brazil-jair-bolsonaro> (discussing Bolsonaro's public misogynistic and homophobic statements and his apparent favor of one of Brazil's former military leaders who engaged in horrific conduct during a time of military dictatorship); Jen Kirby, *What You Need to Know About Jair Bolsonaro, Brazil's New Far-Right President*, VOX (Jan. 2, 2019), <https://www.vox.com/2019/1/2/18165663/jair-bolsonaro-president-brazil-trump> (discussing Bolsonaro's targeting of minorities and possible abuses).

CONCLUSION

Without effective enforcement provisions, the LGPD cannot compel compliance with the law. It is a confusing law that organizations will be hard-pressed to comply with. Adopting the GDPR's effective enforcement provisions, which create a truly independent data protection agency, would make the LGPD an enforceable law. An independent data protection agency could inspire confidence from Brazilians in the sincerity of the protections outlined in the law. Additionally, because most global companies have already adjusted to be in compliance with the GDPR, a possible benefit is increased compliance with the LGPD because they are already complying with the EU's regulation. This could make it easier for global companies and organizations to comply, making Brazil an attractive jurisdiction with an "adequate level of protection," as enumerated in the GDPR.²⁶³

Brazil is poised to be a regional leader for data privacy, if President Bolsonaro enacts effective enforcement provisions for the LGPD. Brazil is already a leader in Latin America due to its size, economic power, and its evolving technology sector. President Bolsonaro has the opportunity to lead the way in data privacy in Latin America and the world.

*Abigayle Erickson**

263. GDPR, *supra* note 1, arts. 45–46.

* B.A., State University of New York, College at Geneseo (2013); J.D., Brooklyn Law School (Expected 2020); Managing Editor, *Brooklyn Journal of International Law* (2019-2020). Thank you to the staff of the *Brooklyn Journal of International Law* for all their work in the publication of my Note, especially George Somi and Wynnee Ngo for their advice and guidance, which made the publication process less daunting. Special thanks to Samantha Sigelakis-Minski and Terry Frederick for their suggestions, encouragement, and generous feedback throughout the writing process; thank you for helping to organize my thoughts. Most importantly, thank you to my family, especially my parents, Phil Erickson and Pam Foster, for their love and support. Without your encouragement, I would not be where I am today. All errors or omissions are my own.